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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 841

HERMAN SCHWABE, INCORPORATED,
Petitioner

v.

UNITED SHOE MACHINERY CORPORATION,
Respondent

RESPONDENT'S BRIEF OPPOSING CERTIORARI

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Petitioner seeks by its statement of Questions Presented to raise a single point in relation to the adequacy of its proof of damages upon the trial, whereas the record discloses that judgment was entered at the trial upon a directed verdict which dismissed the complaint on a variety of grounds (R. 767a-73a).

The petition, taking no account of the several grounds of dismissal, fails to comply with Rule 19 of this Court. The decisions of Federal courts of appeals on the application of the rule of damages on various states of fact, which petitioner alludes to, do not show a conflict among the circuits because of the great disparity of the factual situations in the several cases. No Federal question was decided by the Court of Appeals here in a way conflicting with applicable decisions of this Court; indeed the opinion of Judge Friendly, 297 F. 2d 90, carefully observes the precepts of the cases on antitrust damages in this Court. No question of construction of a Federal statute is involved.

In more detail, the record discloses the following grounds for denial of the writ:

1. The question of damages here presents no important point of law and was rightly decided.

Petitioner seeks to make it appear that the Court of Appeals decision unduly disparages the role of a jury in civil antitrust cases (pet. 6) and that it drew every inference in favor of respondent (pet. 7).

These criticisms are most unjust to the very careful opinion of Judge Friendly which acknowledged that a Federal court must be careful not to set the threshold to the jury room too high (pet. 19) and honored the precept by a discriminating view of the evidence. The Court of Appeals well pointed out that the very nature of a jury trial (here of course invoked by petitioner) requires that this group of laymen be protected from "an array of figures conveying a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it" (pet. 19).

Here the really chimerical theory of damages presented by petitioner is illustrated by the series of assumption upon assumption which it involved. These assumptions were (a) that the percentage of petitioner's business in clicking machines obtained in the non-shoe trade (the so-called "outside trade") in 1956 was the percentage which would have obtained in the shoe machinery business under competitive conditions; (b) that the total amount of clicking machines outstanding in non-shoe industries was 10,000; (c) that petitioner's 15.54% share in the non-shoe trade represented by its proportion of clickers against the assumed 10,000, represented also the share of clicking machines and 23 other shoe machinery types which petitioner would under competitive conditions have distributed in the shoe trade; (d) that petitioner was entitled to take as its profit norm in computing profits which it would have made on the assumed distribution of these 24 types in 1953-7 the 19.81% which it made on clicking machines only in its best year 1946;

and (e) that accordingly petitioner was entitled to a 15.54% participation in respondent's actual profits upon respondent's distribution of the 24 machine types in 1954-9.

Such a claim for lost profits seems even more extreme than those which have been dismissed by the courts of appeals of other circuits: *Baush Machine Tool Co.* v. *Aluminum Co. of America* 79 F. 2d 217 (CA 2 1935), cert. denied 293 US 589; *Flinkote* v. *Lysfjord* 240 F. 2d 308 (CA 9 1957), cert. denied 355 US 835; *Beacon Fruit & Produce Co., Inc.* v. *H. Harris & Co., Inc.* 260 F. 2d 958 (CA 1 1958), cert. denied 359 US 984.

Judge Friendly clearly pointed out the error of Schwabe's various assumptions. He called attention to the lack of basis for the assumption of a 10,000 clicker population in the non-shoe trade (pet. 18). Petitioner cites for the figure of 10,000 R. 452a, 453a, 539a, 540a (pet. 8). Reference to these pages shows only the vaguest support for a figure of 10,000. R. 452a attributing 1,500 outside trade clickers to Schwabe, more to respondent in the ratio of three-to-one, "a few less" to Rapid, "a lot less" to Hamlin, "a lot less" to Fales and Reese, "a few" to Amco, and to Bata "about the same as Hamlin". The other references are to colloquy of counsel on a different point, giving no figures whatever. The aggregation of these guesses into "10,000" can be only an assumption, as petitioner's expert called it (R. 644a). The rickety structure of ambitious surmises erected on such a foundation could not but be rejected by the Court of Appeals, as it was by the District Court in directing a verdict.

It may be noted in passing that *Richfield Oil Corp.* v. *Karseal Corp.* 271 F. 2d 709 (CA 9 1959), cited at pet. 7 for the proposition the petitioner may look to an outside market to prove damages, is in no way comparable. The outside market called in *Richfield* the free market, was commerce in waxes and polishes which was identical throughout

the field, except that defendant Richfield Oil Corporation was accused of having excluded plaintiff's product by exclusive dealing arrangements. Except for the restriction, there was entire parity of conditions between the free and the restricted market. Here the outside or non-shoe trade utilizes machinery for camera cases, handbags, holsters, belts, gloves, and all manner of goods requiring simpler and less complicated operations than does shoe manufacture. The degree of penetration of the non-shoe trade by a manufacturer of a simple type of machine like clickers, might well be different from its success in the shoe trade where pulling-over, assembling, and other complex machines made by the respondent were peculiarly called for. In other words, as Judge Friendly well pointed out, the difference here between the outside trade and the shoe trade was not exclusively a difference between what petitioner calls non-competitive as against competitive conditions. It was a difference between markets essentially non-comparable.

2. The case below was determined by many other deficiencies in petitioner's proof.

The deficiency in petitioner's proof of damages was only one part of the case below. A basic reason for the directed verdict was petitioner's failure to call a single direct witness in support of its claim of monopolistic and restrictive practices in the relevant period 1953-7, respondent having procured summary judgment which limited the issues to that period *Herman Schwabe, Inc.* v. *United Shoe Machinery Corporation* 274 F. 2d 608, cert. denied 363 US 811. The record in this period was far different from that in the 1922-51 period dealt with by Judge Wyzanski's judgment in *United States* v. *United Shoe Machinery Corporation* 110 F. Supp. 295, 347 US 521. The careful examination made by Judge Friendly of petitioner's extremely flimsy evidence in connection with the hearsay point (pet. 21-4) illustrates

from only one aspect of the case, the deficiencies of proof which characterized petitioner's presentation at the trial. These deficiencies would continue to support judgment for the respondent even if petitioner's theory of damages were accepted.

Conclusion

The petition is without merit and the writ should be denied.

Respectfully submitted,

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